



Neutral Citation Number: [2024] EWHC 627 (KB)

Case No: QB-2020-003439

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**KINGS BENCH**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/03/2024

**Before :**

**The Hon. Mr Justice Sweeting**

**Between :**

**MR OMAR ELBANNA**

**Claimant**

**- and -**

**MR TOM CLARK**

**Defendant**

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**MR JAMIE CLARKE** (instructed by **SLATER AND GORDON SOLICITORS**) for the  
**CLAIMANT**

**JACK HOLBORN** (instructed by **WEIGHTMANS LLP**) for the **DEFENDANT**

Hearing dates: 16TH JANUARY to the 19TH JANUARY 2024

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**Approved Judgment**

This judgment was handed down remotely at 2.00pm on 20<sup>th</sup> march 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWEETING

## **The Hon. Mr Justice Sweeting :**

### **Introduction**

1. This is my judgment following the trial of a preliminary issue as to liability. On 7th of October 2017 the Claimant, Mr Elbanna, and the Defendant, Mr Clark, were taking part in an amateur rugby match, played under Rugby Football Union (“RFU”) laws , on opposing sides. The Claimant was playing for Cheltenham Tigers (“Cheltenham”) and the Defendant for Midsomer Norton (“Midsomer”). As the game was restarted for the second half, the Defendant ran forward to chase the ball and collided with the Claimant causing him to suffer a serious spinal injury at the C5/C6 level. The match was completed on another pitch as the Claimant was not moved before the emergency services attended.
2. By letter of the 12th of January 2024, shortly before trial, the Defendant admitted that the Claimant had suffered an acute injury as a result of that collision and withdrew any positive case that there had been any earlier acute injury. The issue which had been ordered to be tried as to causation fell away. The medical experts were not called to give evidence. The trial proceeded as to liability alone. I nevertheless accept the caveat entered by the Defendant that it would be unwise to seek to draw any conclusions about the force or nature of the impact simply from the injuries sustained.
3. The Claimant's pleaded case was that the collision resulted from a reckless or negligent breach of the duty of care owed by the Defendant to the Claimant as a fellow participant in the game. During the evidence it was suggested to the Defendant that the collision was intentional and designed to remove the Claimant from the game temporarily. There was no suggestion that the Defendant intended to cause the injuries which in fact resulted. The Defendant denies that there was any breach of duty on his part; his case is that the collision was a simple accident of the sort which can occur inadvertently in the context of a fast-moving game involving physical contact.
4. Both Claimant and Defendant were experienced amateur rugby players. The Defendant had played throughout the first half whilst the Claimant had come on to the pitch with 10 to 15 minutes of the first half to go. Both returned for the second-half. At half time Midsomer were behind and were taking the kick at the restart. Cheltenham were receiving the ball. The two forward packs had lined up opposite each other. The Claimant was playing at his usual position of prop forward and the Defendant at open side flanker.
5. The match was being filmed for the purpose of training the match referee. The camera was operated by Mr Wakelin who had been appointed to record the match by the Gloucester and District Referees’ Society. This activity was part of his role in the coaching and development of referees within the RFU South West Group. The opposing sets of forwards were closest to the camera which was positioned near to or at the halfway line. The entire incident was captured on the video recording which shows clearly what each of the Claimant and the Defendant were doing, their position on the field and the moment of collision. The video had, helpfully, been edited for the purpose of an RFU citing appeal hearing so that the recording played in court contained both the original footage as well as versions which had been slowed down and zoomed in.

## Expert Evidence

6. Both of the parties called experts, Mr Debney on behalf of the Claimant and Mr Cuthbertson on behalf of the Defendant. The experts had been instructed to provide evidence in relation to the relevant laws of the game of Rugby Union and their application to the collision as well as expert evidence in relation to “any other relevant matters to the collision”. This latter task principally involved commentary on what could be seen in the video recording.
7. In the course of his cross examination, it was suggested to Mr Cuthbertson that he should not have accepted instructions to act as an expert because of his previous and ongoing connection with the RFU. It was said that his approach was partisan, involving a selective critique of the evidence which amounted to arguing the Defendant's case.
8. I do not accept that there was a conflict which precluded Mr Cuthbertson from acting as an expert for the Defendant. The Defendant was sued as an individual and there was no evidence before the court as to the involvement of the RFU or as to the insurance position. Mr Cuthbertson's role as chair of the working group which had considered rule changes and then the RFU's Law's Sub-committee added to his expertise in relation to the application of the laws of the game. The fact that he had for a period served as a non-executive board member of the RFU, that his contribution had been recognised by the RFU so that he still enjoys certain privileges as a “distinguished” member are simply a consequence of his long involvement with the game, at a high, albeit largely administrative, level. His status as an expert had not been made the subject of any application before the commencement of the trial and I do not consider that his evidence was other than a fair and independent opinion based upon his acknowledged expertise.
9. The experts agreed in their joint statement that:
  - i) “.. if Mr Clark's statement is accepted, then there has been no foul play contrary to the Laws of the Game.
  - ii) ..if Mr Elbanna's Claim is accepted, then there has been foul play contrary to the Laws of the Game.”
10. This was a tacit acceptance that this case, as other cases of its type, turns essentially on its facts. The experts came to different views in interpreting what the video recording showed, particularly in the few seconds before the collision.

## The Laws of the Game

11. The laws of rugby are set by its global governing body, World Rugby. Rules regulating contact are necessary to ensure that the game is played both fairly and safely. Law 10.4(f) was agreed to be the most germane of the potentially applicable rules. It provides: “**Playing an opponent without the ball**. Except in a scrum, ruck or

maul a player who is not in possession of the ball must not hold, push or obstruct an opponent not carrying the ball.”

12. Within this general prohibition there are limited circumstances in which players who are not in contact with the ball may deliberately make contact with each other; an example is when a player and an opponent are running for the ball, where they are permitted to push each other shoulder to shoulder (Law 10.1(a)). Law 10.4(e) characterises “playing a player without the ball” as dangerous play.
13. There was some argument as to the degree of intentionality required by the concept of “playing an opponent”. Ultimately, I do not conclude that the experts had taken significantly different positions. Both agreed that the laws were designed for pragmatic application on the field of play by a referee who would have to make a rapid and objective determination of what had been observed. Players are held accountable for their actions on the pitch. Playing an opponent without the ball connotes physical contact with (by holding or pushing) or obstruction of an opponent outside of the circumstances in which that is permitted when playing the game according to its laws. Nevertheless, it was inherent in the agreement reached in the joint statement that a collision could have occurred in a way which did not involve an infringement of the laws thus recognising a qualitative distinction between pushing, holding or obstruction and a player simply, and unavoidably, running into another. There is a separate and additional provision in relation to an infringement which is aggravated (or “elevated” according to Mr Cuthbertson) by being intentional (Law10.2(a)). A lack of care is not an “intent” and the laws do not explicitly refer to or require intent. In relation to dangerous tackling, for example, the laws stipulate that a player must not tackle an opponent early, late or dangerously (Rule 10.4(e)). This rule plainly envisages that it may be infringed deliberately or carelessly. I note that even when a player has the ball he may not be charged or knocked down by an opponent who does not try to grasp that player (Law10.4(g)).

### **The Legal Framework**

14. There was no dispute between the parties as to the legal principles which apply in the context of a sporting contest. The relevant authorities were recently considered by Martin Spencer J. in the case of *Czernuszka v King* [2023] EWHC 380 (KB). He summarised his conclusions as follows [60]:

“So far as the legal test is concerned, I endorse Mr Weir KC's basic proposition that, within the law of negligence, the test is whether the Defendant failed to exercise such degree of care as was appropriate in all the circumstances: this was the test endorsed in *Condon v Basi* [1985] 1 WLR 866 where the Court of Appeal adopted the formulation and approach of Kitto J in *Rootes v Shelton*. In particular, I do not consider that the Court of Appeal, in *Blake v Galloway* did, or intended to, lay down any rule or principle that, in the sporting context, the conduct complained of must be reckless or demonstrate a very high degree of carelessness in order for liability to be established. That was the standard applied in that particular case, and in the particular circumstances of that injury arising out of horseplay with the factors described by Dyson LJ and set out at para 44 above. Indeed, a requirement to establish recklessness was expressly rejected and disapproved by the Court of Appeal in *Smoldon v Whitworth*.”

15. I agree with and adopt that summary. The passage in the judgement of Kitto J. with which the Court of Appeal agreed in *Condon v Basi* included the following in relation to the negligence test and the significance of infringement of the rules:

“...the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiffs injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the Defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances.”

### **The Video Recording and Factual Findings**

16. On the video recording the Defendant's team is playing from left to right on the screen. In the course of the evidence the convention was adopted of using the term left and right from the Defendant's perspective as he ran up the pitch. His right-hand side was therefore in view from the touchline from which the video recording was made. I adopt that approach. The halfway line bisects the pitch and runs across its width. On either side of the halfway line are two further lines at a distance of 10 metres from the halfway line (“the 10-metre line”). Running along the length of the pitch, on either side, parallel to and 15 metres from the touchline is a further line (“the 15-metre line”).
17. At kick-off the Defendant was just behind the halfway line, about a metre to the right of the 15-metre line. He was one of the fastest men on his team. His job at that stage was to run towards where he knew that the kicker intended to place the ball. The aiming point was further along the 15-metre line, beyond the 10-metre line which the ball had to clear under the laws. It was the Defendant's practise, in accordance with the plan of play, to run along the 15-metre line in order to reach the ball as quickly as possible.
18. What can be seen on the video (and the facts as I find them from the video recording) is as follows. At kick-off the Claimant is standing on the 15-metre line or just to the left of it facing across the pitch towards the kicker. He is the first opposing player directly in front of the Defendant. His left foot is in contact with the 15-metre line. He is about 12 metres from the halfway line. He is looking across the field at the ball. He pivots on the spot as he watches the ball in the air so that he is facing towards his own team and to where the ball is likely to land. The receiving Cheltenham player, Mr Hillier is also on the 15-metre line and so directly behind the Claimant. The Claimant is still standing to the left of the 15-metre line but his right foot is now in contact with it as a result of his turn through 90 degrees. He brings his left foot together with his right foot so that both feet are on the 15-metre line. He takes a short step forward with his left foot (towards Mr Hillier) and then brings his right foot forward past his left foot and out to the right. At that point he is struck from behind. The ball is still high in the air (towards the top of the video frame in which the collision occurs). The

Claimant is, at all times, looking at the ball and turned away from the Defendant. He does not see and could not have seen the Defendant running towards him from the moment he turned to face his own team.

19. As the kick-off is taken the Defendant runs forward at speed. He takes a number of strides before reaching the halfway line and is sprinting as he crosses it. He then moves on to the 15-metre line. From the halfway line to the point of collision (some 12 metres) he takes about 11 strides. The Midsomer second-row, Mr Goddard is running level with the Defendant to his left and is positioned further into the pitch beyond the 15-metre line. Mr Goddard appears to anticipate that he may be in a position to tackle the receiver and adjusts his foot position and checks his run in order to time his tackle (in his evidence he said he was making sure that he did not tackle the receiver before he actually had the ball or whilst he was in the air). The Defendant is at about the same position as Mr Goddard at this point but does not slow or adjust his position. He still has about 5-6 strides left before the collision. He continues at full speed on the same line, heading for the Claimant. He runs directly along the 15-metre line. His feet can be seen to make contact with it. He does not deviate from his line until the penultimate stride. He moves to the right as the Claimant is also stepping off the 15-metre line.
20. Moments before the collision (with about two strides to go), the Defendant does change his body position. He described it as “bracing for the impact”. He does so before the Claimant has moved from the 15-metre line and as he, the Claimant, has brought his feet together. The Defendant does not appear to slow down or try to maximise the area of contact; in fact, quite the reverse. The Defendant’s change of position involves him bringing his arms in and rotating his upper body so that his left upper arm and shoulder dip and are driven into the centre of the Claimant’s upper back. The force is plainly considerable. The Defendant is 5 feet 7 inches tall and weighed 80 kilogrammes on his own estimation. The Claimant was a much taller and heavier prop forward. The force of the impact throws the Claimant forward even though he is moving partly sideways.
21. The Claimant described feeling a “massive impact”. He appears to be completely unaware that he is about to be struck from behind. He does not brace himself or turn or curl to protect his spine. Both his written and oral evidence was to the effect that he had hardly moved prior to the collision. Mr Wakelin described him stepping “slightly to the right” before he was struck hard in the back by an opposing player using his forearm. This accords with what can be seen on the recording.
22. Mr Kirchner, one of the Claimant’s teammates, was playing in a deep position at full back. He can be seen on the video recording. He was looking at the ball but his line of sight went directly through where the receiver was standing towards where the collision occurred. He formed the view that the Defendant had intentionally run into and knocked over the Claimant. In his evidence he said that he did not recall the Claimant stepping to the right because he did not move very much at all. The Defendant had travelled something in the order of 12 metres whilst the Claimant had hardly moved a metre. He thought that the Defendant had made contact on purpose. He said that he saw the Defendant divert into the Claimant as if he was deliberately veering into him. He regarded this as gamesmanship and foul play. In his view the Defendant could have avoided the Claimant or pulled up before the collision or “taken the power out” of the impact. When the game was stopped Mr Kirchner immediately

went to speak to his captain Mr Hillier who had in fact received the ball. As a result of what was said between them Mr Hillier then approached the referee. Both what Mr Hillier said to the referee and the referee's reply were captured on the video recording and have been agreed as follows:

Mr Hillier: "Cheap shot in the back, just came in for no reason, straight into his back."

Referee: "Right, yeah I didn't see I didn't see I didn't see I didn't see a cheap shot right I just thought he'd gone in just, he had turned and he had gone into the back of him. That's all I and I was looking at the ball as well."

23. The referee was not called as witness. He did not impose any sanction on the Defendant and does not appear to have identified what he saw as foul play. However, it is evident from his reply to Mr Hillier that he was concentrating elsewhere and had a partial view of the collision with a number of Midsomer players in his line of sight. There was no obvious reaction from the crowd according to the witnesses and none can be identified on the recording. The usual post-match socialising between the players took place. That is hardly surprising. This was not obvious foul play, such as a high tackle, and it happened off the ball. There was in fact some evidence of post-match commentary from spectators which was critical of the Defendant, but evidence of this sort did not assist either way and its significance, if any, was wholly eclipsed by the clarity of the video recording.
24. The Defendant's evidence was that he had stayed on the 15 metre line and could see that the Claimant was not looking at him. He said that he tried to avoid the Claimant and was not disregarding his presence nor was he out to hurt anyone. The crucial part of his evidence was that he had moved to his right because the Claimant had "moved into his path" and he had made an effort to get around him. His contention was that if the Claimant had not moved he would have run straight past him. He denied that the collision was deliberate. There was evidence from a number of other Midsomer players that the Claimant had turned and moved to his right although this was necessarily impressionistic in nature given that they were concentrating on the ball and where it was likely to land.
25. Although it was suggested to the Defendant that he might have shouted a warning his evidence, which I accept, is that this was not normal practice, would not have been feasible in the circumstances and would not have struck the Claimant as a warning addressed to him. Although the Defendant was cross examined about his disciplinary record and in particular an incident in November 2008 which resulted in a red card this did not, in my view, take matters any further and I have disregarded it in reaching conclusions in this case.
26. The Claimant's club cited the Defendant for foul play. A disciplinary panel hearing took place on the 1st of November 2017. The panel decided that there was no incontrovertible evidence or grounds to rule that the collision had been either dangerous charging or shouldering or that any acts contrary to good sportsmanship had occurred. The Cheltenham Rugby Football Club Vice Chairman indicated at the hearing that there would be an immediate appeal. An appeal hearing took place on the 15th of March 2018. The test to be applied under the relevant regulations was whether the panel's decision was one to which no reasonable body could have come. The

appeal panel concluded that the decision should be upheld because it was not an unreasonable one.

## **Conclusions**

27. Just before the impact the Defendant appears to alter his line to move to the right, but he does that as the Claimant is also moving off the 15-metre. It appears to me to be as much a consequence of the Defendant's rotation of his upper body to bring his shoulder forward as any change in the position of his legs. Mr Debney described this as "tracking" the Claimant. He plainly considered that the Defendant intended to collide with the Claimant's back and had altered his line to make contact with his left shoulder as his target moved.
28. Mr Cuthbertson attributed the collision to the fact that the Claimant had moved in a perpendicular direction at 90° to the 15-metre line and towards the touchline. He said he could not think of any tactical reason for moving wholly in that direction and described it as unusual. I agree with Mr Cuthbertson that the obvious course was to run diagonally and then around the back of the ruck or maul which was likely to form around the receiver. The Claimant would then have been able to rejoin play without being offside and without impeding the Midsomer players. However, I cannot identify the 90° movement that Mr Cuthbertson refers to. His observation that it would have been an illogical move tends to confirm the view I take that it did not occur. The Claimant was just completing his pivot and starting to run when the accident occurred. That was his evidence. His momentum was to the right but, if anything, the last images of his body position before he was struck are consistent with the sort of running direction that Mr Cuthbertson was referring to as the diagonal route he would have expected him to take. I doubt, in fact, that it would have made any difference to the collision whether the Claimant intended to go at 45° or 90° to the 15-metre line in returning to where he could be involved in the game. He was struck just as he was about to move off the 15-metre line.
29. Mr Cuthbertson suggested that one option open to the Claimant was not to move and that this was the safest course. However, during cross examination he accepted, as did the Defendant, that he would normally expect a player in the Claimant's position to move. For my part I can think of no reason why the Claimant would stand still or why that would be a realistic expectation on the part of any opposing player. The Defendant could see that the Claimant's back was turned towards him. The Claimant was not in a position where he needed to choose a "safe" option. Mr Cuthbertson accepted that the Defendant should have anticipated that a player might move; the likely movement being diagonally to the right.
30. Had the Claimant stayed perfectly still during the Defendant's run towards him the Defendant might just have just passed him with a glancing contact but for all practical purposes from the moment the Defendant moved onto the 15-metre line he was running directly at the Claimant as he stood on or next to the same 15-metre line. In



order to avoid any contact with the Claimant the Defendant would either have to have slowed down, deviated from his line or the Claimant would have to have moved out of the way. With 4 to 5 strides to go the Claimant was directly in the Defendant's path with his back to the Defendant. A collision was not inevitable at that point but it required the Defendant to reduce his speed or alter his line if it was to be avoided. He did neither. Mr Goddard, to the Defendant's left did check his speed. It is apparent that the Defendant could also have done so. In fact he chose to run so close to the Claimant that, at best, he would have been brushing past him at speed. He was courting the risk that even a slight movement would result in a forceful contact, with most of the kinetic energy being transferred to the Claimant, given that he was virtually static in comparison to the Defendant.

31. The Defendant's evidence, in his witness statement, was predicated on the assertion that the Claimant was to the left-hand side of the 15-metre line so that there was a clear path and that he, the Defendant "instinctively moved slightly to my right as I was going to go past him to where I thought the ball was going to come down". On this account a movement to the right occurred before the Claimant moved onto the 15-metre line. It would in turn have required the Defendant to move off the 15-metre line. In his oral evidence the Defendant said that he moved to his right because the Claimant had moved into his path. That lies uneasily with what can be seen on the video recording where the Defendant's feet are still on the line less than two strides before the impact.
32. I preferred Mr Debney's evidence as to what could be seen on the video recording supported by the evidence of Mr Kirchner whose position on the field gave him a view that others did not have. Mr Kirchner's immediate response and the terms of his complaint, relayed to the referee via Mr Hillier and picked up in the recording, could not have been the product of reflection after the event nor coloured by knowledge of the seriousness of the injuries. Mr Debney had been a professional referee and his evidence, in my view, provided a more realistic assessment of the behaviour which could be observed. In relation to the Defendant's actions just before the collision he said; "...in my experience players who are trying to soften the impact on an opponent do not usually brace for impact and lead with the shoulder. They should do the opposite and make the contact area between them and the opponent as large as possible to dissipate the energy of the impact." The conclusions in his report included the following:

"The Claimant had no opportunity to prepare or brace himself for the impact.

In my opinion, the Defendant had more than enough time and the opportunity to entirely avoid or at least moderate his contact with the Claimant and avoid colliding with him so forcefully.

The Defendant makes no attempt to slow down, deviate away from the Claimant or soften the contact. Each of these would have been expected in this case and it happens in almost every rugby game where a player commits to contact but pulls out at the very last moment.

A player of the Defendant's stated experience should have known how to avoid contact with the Claimant and anticipate any potential actions by the Claimant."

33. These conclusions encapsulate the criticisms that can be made of the Defendant's actions on the playing field and are borne out by the evidence for the reasons set out above. The collision was avoidable or at the very least could have been reduced to a soft contact which would not have caused injury. Whether or not the collision was intentional, to have run directly at the Claimant at full speed and to have collided with him in the manner in which the Defendant did was reckless. It amounted to playing an opponent without the ball in contravention of the laws and courted the risk of injury; a risk which eventuated with catastrophic consequences for the Claimant. In the circumstances I conclude that liability has been made out.